Notre Dame Law Review

Volume 57 | Issue 4 Article 3

1-1-1982

First Amendment v. Right of Publicity in Theatrical Imitations--A Delicate Balance

John C. Greiner

NOTES

The First Amendment v. Right of Publicity in Theatrical Imitations—A Delicate Balance

The right of publicity enables celebrities[1] to protect the use of their name or likeness from commercial exploitation by others. The right also permits celebrities to demand a share of the profits others realize from such commercial exploitations.[2] In two recent decisions, federal courts held that theatrical imitations[3] of a celebrity, without the celebrity's or his heirs' permission, constituted a wrongful appropriation of the celebrity's name and likeness, and thus violated his

1 For purposes of this note, celebrities are persons who are able to profit from their fame through endorsements and personal appearances.

2 The right of publicity developed as famous people attempted to prevent the unauthorized use of their names and likenesses. Initially, they alleged that the unauthorized uses violated their right to privacy. *See, e.g.*, O'Brien v. Pabst Sales, Co., 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 315, U.S. 823 (1942); Gautier v. Pro-Football, Inc., 203 N.Y. 354, 107 N.E.2d 485 (1952). The complaint in these cases, however, was not that the individuals received unwanted publicity, but that they had failed to reap its benefits. Felcher & Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1588 (1979) [hereinafter cited as Felcher & Rubin]. In 1953, the right of publicity was judicially recognized as a right distinct from the right of privacy. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). There, the court noted: "We think that, in addition to and independent of [the] right of privacy. . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . ." *Id.* at 868.

Since 1953, the Supreme Court of the United States, as well as the third, sixth, eighth, and ninth circuits and state courts in California, Georgia, New Jersey, New York, Ohio, and Wisconsin have recognized the right of publicity. *See* Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977) [both the Ohio Supreme Court and the United States Supreme Court recognized the right]; Memphis Dev., Etc. v. Factors, Etc. Inc., 616 F.2d 956 (6th Cir. 1980) *cert. denied* 449 U.S. 953 (1980); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Cepeda v. Swift and Co., 415 F.2d 1205 (8th Cir. 1969); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir. 1956), *cert. denied* 351 U.S. 926 (1956); Lugosi v. Universal Pictures, 160 Cal. Rptr. 323, 25 Cal. 3d 813, 603 P.2d 425 (1979); Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E. 2d 496 (1966); Canessa v. J.I. Kislick, Inc. 97 N.J. Super. 319, 235 A.2d 62 (1967); Russell v. Marboro Books 18 Misc. 2d 182, 183 N.Y.S. 2d 8 (1959); Hirsch v. S.C. Johnson & Sons, Inc. 90 Wis. 2d 379, 280 N.W.2d 129 (1979). *See also* Felcher & Rubin at 1589.

3 Theatrical imitations are imitations presented on stage or screen for an audience. Theatrical imitations are thus distinguished from imitations presented as commerical advertisements.

right of publicity.[4] However, since the Supreme Court of the United States has ruled that entertainment is protected first amendment speech,[5] these decisions raise the question whether and to what extent the first amendment guarantee of free speech limits a celebrity's or his heirs' ability to protect the celebrity's name or likeness from unauthorized use.[6]

This note examines theatrical imitations and the clash between the right of publicity and the first amendment guarantee of free speech. Part I analyzes judicial standards used in prior right of publicity cases to determine when the first amendment precludes a right of publicity action; Part II determines the appropriateness of these standards in theatrical imitation cases; and Part III proposes a test for determining when the first amendment precludes a right of publicity action in theatrical imitation cases and then analyzes the proposed test by applying it to two recent theatrical imitation cases.

I. The First Amendment and The Right of Publicity—A Balancing Test

Although theatrical imitation actions are the most recent right of publicity cases involving first amendment questions, the first amendment has been at issue in many earlier right of publicity cases.[7] In these cases, the courts balanced the celebrity's interest in prohibiting the unauthorized use of his name or likeness against the user's first amendment right of free speech.[8]

A. *News and Newsworthy Figures*

The first amendment guarantees have traditionally been most rigidly enforced in news and newsworthy figure cases.[9] The first amendment guarantees "[a]t least the liberty to discuss publicly and

4 Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Marx v. Day and Night Productions, 50 U.S.L.W. 2229 (S.D.N.Y. Oct. 20, 1981).

5 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977).

6 *See generally*, Felcher & Rubin, *supra* note 2 at 1590; Sims, Right of Publicity: Survivability Reconsidered, 49 FORDHAM L. REV. 453, 485 (1981) [hereinafter cited as Sims]; Note, *Human Cannonballs and the First Amendment*, 30 STANFORD L. REV. 1185 (1978); Note, *The Right of Publicity - Protection for Public Figures and Celebrities*, 42 BROOKLYN L. REV. 527, 549 [hereinafter cited as Note, *The Right of Publicity*].

7 *See. e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Frosch v. Grosset & Dunlap, Inc., 427 N.Y.S. 2d 828, 75 A.D. 768 (1980); Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968).

8 Sims, *supra* note 6, at 486-97.

9 *Id.* at 485.

truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[10] Protecting publication of newsworthy items from undue restraint advances this objective. A right of publicity permitting a celebrity to prohibit or punish the dissemination of news would contravene the first amendment policy aims.

Paulsen v. *Personality Posters' Inc.*[11] illustrates how far courts will go to protect the publication and distribution of newsworthy matters. There, Paulsen, a well-known comedian, brought a right of privacy action[12] to enjoin the defendant from distributing a poster commemorating Paulsen's candidacy in the 1968 presidential campaign. He alleged that the poster was an unauthorized appropriation of his name and likeness. Paulsen also contended that the poster was commercial speech and, therefore, unprotected by the first amendment.[13] The court held otherwise, noting:

> [w]hen a well-known entertainer enters the presidential ring, tongue-in-cheek or otherwise, it is clearly newsworthy and of public interest . . . . [and] it is sufficiently a matter of public interest to be a form of expression which is constitutionally protected and deserving of substantial freedom.[14]

Yet, the First Amendment protection afforded newsworthy matters is not without limits. In *Zacchini* v. *Scripps Howard Broadcasting Co.*,[15] the Supreme Court upheld a right of publicity action brought in response to a news broadcast of an entire "human cannonball" act, without the performer's consent. The court emphasized the right of publicity's economic aspect in holding that a broadcast of Zacchini's entire act posed a substantial threat to the performer's ability to profit from his act and thus violated his right of publicity.[16] The Court recognized that its decision would not prevent a news report about the performance, but it would prevent a rebroadcast of the entire act.[17] The Court analogized the unauthorized rebroadcast

10 First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).

11 59 Misc. 2d 444, 299 N.Y.S. 2d 501 (Sup. Ct. 1968).

12 The plaintiff brought this action under § 51 of the New York Civil Rights Law. This statute created a cause of action resembling the right of publicity, because it authorizes injunctive relief and damages where a person's "name, portrait or picture is used . . . for advertising purposes or for the purpose of trade." N.Y. Civ. Rights Law § 51 (McKinney 1976 & Supp. 1980). *See* note 24 and accompanying text *infra*.

13 *Paulsen*, 299 N.Y.S. 2d at 505.

14 *Id.* at 507.

15 433 U.S. 562 (1977).

16 *Id.* at 574-75.

17 *Id.* at 575.

to an unauthorized broadcast of an entire copyrighted dramatic work or a baseball game.[18] The *Zacchini* holding places some limit on the first amendment protection of newsworthy items, but short of an entire rebroadcast, right of publicity actions concerning news or newsworthy items will probably fail.

B. *Literary Works*

Courts and commentators have noted that literary works, such as biographies and fiction, often serve the same interests as news or newsworthy items. Literary works share with news the function of informing the public about people and events.[19] In addition, literary works are a product of the creative activity which our society values.[20] For these reasons, courts have granted literary works substantial First Amendment protection in right of publicity actions, subject to certain limited exceptions.[21]

Courts have refused to grant first amendment protection to literary works that intentionally mislead the public.[22] In *Spahn* v. *Julian Messner, Inc.*,[23] a well-known baseball player brought an action under the New York "Privacy Right" statute, alleging that publication of his unauthorized biography violated his right to privacy.[24] The New York Court of Appeals noted that "[c]ourts have engrafted exceptions and restrictions onto the [right of privacy] statute to avoid conflict with the free dissemination of thoughts, ideas, newsworthy

18 *Id.*

19 "[b]ooks . . . are vehicles through which ideas and opinions are disseminated . . . ." *Id.* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952); Hicks v. Casablanca Records, 464 F. Supp 426 (S.D.N.Y. 1978); Guglielmi v. Spelling-Goldberg Prod. 25 Cal. 3d 860, 867, 160 Cal. Rptr. 352, 357, 603 P.2d 454, 459 (1979); Felcher & Rubin, *supra* note 2, at 1598; Sims, *supra* note 6, at 488.

20 *Hicks*, 464 F. Supp at 430.

21 Felcher & Rubin, *supra* note 2, at 1598.

22 The first amendment does not preclude a right of privacy action, Time, Inc. v. Hill, 385 U.S. 374 (1967), or a libel action by a public official, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), against the author of a story that is known to be false or is written with reckless disregard to its truth or falsity.

A corollary application of these principles is in cases where a celebrity's picture is used to "draw attention" to an article that is unrelated to the celebrity. This misleading use of the celebrity's picture has been found to be outside First Amendment protection. *See*, Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Groucho Marx Productions, Inc. v. Playboy Enterprises, Inc., (S.D.N.Y. No. 77 Civ. 1782, Dec. 30, 1977); Grant v. Esquire, Inc. 367 F. Supp. 876 (S.D.N.Y 1973).

23 18 N.Y. 2d 324, 221 N.E. 2d 453, 274 N.Y.S. 2d 877 (1966), *vacated*, 387 U.S. 239, *aff'd*, 21 N.Y. 2d 124, 233 N.W. 2d 840, 286 N.Y.S. 2d 832 (1967). *See also* Sims, *supra* note 6, at 488.

24 *Spahn*, 221 N.E. 2d at 544. See note 12, *supra*.

events and matters of public interest."[25] The court determined that public figures were considered an exception to the statute so that the law provided little protection to the celebrity's privacy.[26] The court ruled, however, that the public figure exception did not apply to a "purported" biography containing "[a] host, a preponderant percentage, of factual errors, distortions and fanciful passages . . . ."[27]

In a later "biography case," *Hicks* v. *Casablanca Records*,[28] the heirs of mystery writer Agatha Christie brought a right of publicity action to enjoin the distribution of a movie and book entitled *Agatha*.[29] In dismissing the complaint, the court ruled that "the right of publicity does not attach here, where a fictionalized account of an event in the life of a public figure is depicted in a novel or a movie, and in such novel or movie it is evident to the public that the events so depicted are fictitious."[30] *Hicks* limits *Spahn* by allowing right of publicity actions only in cases where fictionalizations are presented as fact rather than fiction. Thus, absent deliberate falsifications or attempts to confuse the public, the first amendment protection of free expression outweighs the asserted right of publicity in literary work cases.

The courts' concern for first amendment interests in *Spahn* and *Hicks* is not limited to biographical works. In *Frosch* v. *Grosset & Dunlap, Inc.*,[31] the New York Supreme Court held that publication of Norman Mailer's book, *Marilyn*, did not violate the Monroe estate's right of publicity. Although the estate's executor disputed the book's characterization as a biography, the court maintained that "[I]t is not for a court to pass on literary categories, or literary judgment."[32] Rather, the court determined that the only question is whether the work is a disguised commercial advertisement for the sale of goods or services.[33] Since *Marilyn* was more than a disguised advertisement, the court concluded that it was entitled to first amendment

25 221 N.E. 2d at 544-45. See note 30 and accompanying text, *infra*.

26 221 N.E. 2d at 544-45.

27 *Id.* at 546.

28 464 F. Supp. 426 (1978).

29 *Id.* See note 56 *infra* for a discussion of the descendibility of the right of publicity.

30 464 F. Supp. at 433. The *Hicks* court noted that the privileges and exemptions engrafted upon the Privacy Right Statute (the cause of action in *Spahn*) are also engrafted upon the right of publicity. The court's list of exemptions included "[m]atters of news, history,biography and other factual subjects of public interest . . . ." *Id.* at 430.

31 427 N.Y.S. 2d 828, 75 A.D. 2d 768 (1980).

32 427 N.Y.S. 2d at 829.

33 *Id.*

protection.[34]

Frosch did not apply or even mention the *Hicks* test.[35] Since *Frosch* apparently did not overrule *Hicks*, it seems that both standards would apply in right of publicity attacks on literary works.[36] Thus, New York courts will probably protect literary works from right of publicity attacks unless the works are disguised advertisements or they mislead the public as to their true nature. If a literary work passes these "tests", the first amendment protections apply.

C. *Commercial Speech*

Right of publicity actions have been most successful in actions against advertisers who use the celebrity's name or likeness to sell a product.[37] Indeed, courts first recognized the right of publicity in an action brought by a baseball player attempting to assign an exclusive right to use his picture on a bubble gum card.[38]

These "commercial speech" cases have been successful for two reasons. First, an unauthorized commercial use of an entertainer's name or likeness causes a readily identifiable economic harm.[39] It gives a false impression of a business relationship between the advertiser and the celebrity, and deprives the celebrity of the advertiser's usual endorsement fee.[40] Second, the courts have been reluctant to extend first amendment protection to commercial speech. Commercial advertising generally lacks the values considered worthy of constitutional protection.[41] Hence, while a newsworthy figure may be

34 *Id.*

35 The opinion in *Frosch* was a brief memorandum decision.

36 While the analysis focuses exclusively on cases decided by New York State Courts and Federal Courts located in New York, these holdings are persuasive authority in the right of publicity and entertainment law areas. The right of publicity originated in New York, and has developed there through a 27 year line of cases. Note, *Elvis Presley: The New Twists*, 1 ENTERTAINMENT L.J. 31, 36 (1981). In addition, New York has been referred to as "[T]he fountainhead of [the entertainment] medium . . ." Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 NW UNIV. L. REV. 553, 583 (1960).

37 Sims, *supra* note 6, at 493. *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), *remanded* 496 F. Supp. 1090 (S.D. N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (1981); Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969); Haelan Laboratories, Inc. v. Topps Chewing Cum, Inc., 202 F.2d 866 (2d Cir.) *cert. denied*, 346 U.S. 816 (1953).

38 Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

39 Felcher & Rubin, *supra* note 2, at 1613-16.

40 *Id.* at 1614. *See also*, Lugosi v. Universal Pictures, 25 Cal. 3d 813, 835, 160 Cal. Rptr. 323, 336, 603 P.2d 425, 438 (1979) (Bird, C.J. dissenting).

41 Sims, *supra* note 6, at 492-93. *But see* Central Hudson Gas v. Public Service Com'n. of N.Y. 100 S.Ct. 2343, 2350 (1980). (The government's power to restrict commercial communi-

the proper subject of news or an informative presentation, the privilege does not extend to a commercialization of his personality.[42] Therefore, while courts have recognized that some commercial speech does convey important information protected by the first amendment, most right of publicity actions involving commercial speech have overcome first amendment challenges.[43]

II. The Inadequacies of Existing Standards

News or newsworthy items, literary works, and commercial speech are the categories of speech found in most right of publicity actions. However, the theatrical imitations involved in two recent decisions present special categorization problems. On the one hand, the Supreme Court has held that entertainment, as well as news, enjoys first amendment protection.[44] On the other hand, entertainment is a commercial enterprise conducted for private profit. Thus, entertainment could be regarded as a form of commercial speech, subject to minimal first amendment protection.[45] Courts have recognized that entertainment conveys ideas and information, as do literary works;[46] thus, they have balanced the conflicting free expression and right of publicity interests in a manner similar to literary work cases.[47]

The balancing approaches used in literary work cases vary, however, depending on the nature of the literary work involved. *Spahn* and *Hicks* hold that biographies must be essentially truthful or be presented in a manner that indicates the work's fictitious nature.[48] But in *Frosch* the test was whether the literary work was "a disguised commercial advertisement for the sale of goods or services."[49] While

---

cation which is neither misleading nor unlawful must be supported by a substantial interest); Linmark Associates, Inc. v. Willinboro, 431 U.S. 85 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 435 U.S. 748 (1976).

42 Sims, *supra* note 6, at 494.

43 See note 37 *supra*.

44 Zacchini v. Scripps - Howard Broadcasting Co., 433 U.S. 562 (1977). *See also*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

45 This is basically the New York district court's attitude in *Marx v. Day and Night Productions*, 50 U.S.L.W. 2229 (S.D.N.Y. Oct. 20, 1981). *Contra*, Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 160 Cal. Rptr. 352, 360, 603 P.2d 454, 462 (1979) ("[Respondent's] interest in financial gain in producing the film did not affect the constitutional stature of respondent's undertaking . . . .")

46 *See* note 19 *supra*.

47 *Id.*

48 *See* notes 23-30 *supra* and accompanying text.

49 *See* notes 32-35 *supra* and accompanying text.

Frosch provides much first amendment protection, and *Spahn* and *Hicks* prevent deception and misrepresentation, none of these decisions adequately protects a celebrity seeking to preserve a style developed through years of hard work.[50]

The right of publicity protects a celebrity's interest in maintaining this style.[51] One commentator has stated that, "[t]he public interest will support the sporadic, occasional and good faith imitation of a famous person to achieve humor, to effect criticism or to season a particular episode, but it does not give a privilege to appropriate another's valuable attributes as one's own without the consent of the other."[52] The *Frosch* standard would protect the celebrity's interest only in cases involving disguised advertisements for goods and services.[53] The *Frosch* standard would thus provide no protection from theatrical imitations which are not advertisements. In addition, an imitator usually does not mislead the public. An imitator's audience normally knows the performance is an imitation and not the real thing. Hence, the *Spahn/Hicks* standard would not protect the celebrity from most theatrical imitations.[54]

In two recent federal district court decisions involving theatrical imitations, the courts did not apply the standards set forth in literary work cases. In their attempt to protect the celebrity's right of publicity, however, the courts may have infringed upon legitimate first amendment interests.

In *Estate of Presley* v. *Russen*, the estate of Elvis Presley obtained an injunction prohibiting production of the Big El Show, a concert performance featuring an Elvis imitator.[55] In *Marx* v. *Day and Night Productions*, the heirs[56] of the Marx Brothers obtained a summary

50 Lugosi v. Universal Pictures, 25 Cal 3d 813, 834, 160 Cal. Rptr 323, 336, 603 P.2d 425, 438 (1979) (Bird, C.J. dissenting).

51 *Id.*

52 Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humourous Commentary*, 35 S. CAL. L. REV. 225, 254 (1962) [hereinafter cited as Netterville].

53 See notes 32-34 and accompanying text *supra*.

54 See notes 23-30 and accompanying text *supra*.

55 Estate of Presley v. Russen, 513 F. Supp. 1339, 1344 (D.N.J. 1981).

56 In *Marx* and *Presley*, the plaintiffs were descendents of the celebrities. Although both courts agreed that the right of publicity survives the celebrity's death, other courts have split on the issue. The split revolves around the right of publicity's characterization. Since the celebrity is able to profit from selling the rights to his name and likeness, many courts characterize the right as a property interest. Thus, these courts have held that the right should descend at death just as any other property right would. *See, e.g.*, Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), *Cert. denied*, 440 U.S. 908 (1979). *See generally* Felcher & Rubin, *supra* note 2 at 1618; Sims, *supra* note 6 at 453-84; Note, *The Right of Publicity*, *supra* note 6 at 541-49.

The courts that refuse to recognize the right's descendibility stress that the right is essen-

judgment against the producers of the play *A Day in Hollywood/A Night in the Ukraine*.[57] The play's second act featured Marx Brothers mimics in a spoof of Marx Brothers style films. In each case, the plaintiffs maintained that their inherited right of publicity in the Presley and Marx Brothers names and likenesses prohibited the unauthorized imitations in the defendants' performances.[58]

Although both courts agreed that the defendants' failure to obtain permission to perform the imitations violated the plaintiffs' inherited right of publicity,[59] their rationales differed. The New Jersey District Court in *Presley* focused on the theatrical imitation's lack of creativity and information.[60] The District Court for Southern New York in *Marx* characterized the play as a misappropriation of the Marx Brothers characters for commercial purposes and, therefore, outside first amendment protection.[61]

These rulings are essentially ad hoc determinations. In each case, the courts weighed the first amendment and right of publicity interests to determine which demanded greater protection *in that particular case*.[62] Unfortunately, this ad hoc process creates uncertainty and may inhibit creative work, because people cannot judge whether a court will protect their work.[63] This uncertainty may have a "chilling effect" on a party's right of free speech.[64] This "chilling effect" is "[p]articularly pernicious where speech is concerned because it tends

---

tially a personal interest. They consider it so unique to the celebrity that it is not devisable. *See, e.g.*, Memphis Dev. Foundation v. Factors, Etc. Inc., 616 F.2d 956 (6th Cir.), *cert. denied*, 101 S. Ct. 358 (1980); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425 (1979).

57 *Marx*, 50 U.S.L.W. 2229 (S.D.N.Y. Oct. 20, 1981).

58 *Id.* at 2229, *Presley* at 1339.

59 50 U.S.L.W. at 2230; 513 F. Supp. at 1361.

60 *Presley*, 513 F. Supp. at 1360.

61 *Marx*, 50 U.S.L.W. at 2230.

62 Goetsch, *Parody as Free Speech - The Replacement of the Fair Use Doctrine By First Amendment Protection*, 3 W. NEW ENGLAND L. REV. 39, 59 (1981) [hereinafter cited as Goetsch].

63 *Id.* at 59; Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939 (1968) [hereinafter cited as Nimmer].

64 The "void for vagueness" doctrine the Supreme Court applies to statutes governing speech illustrates its concern for clear standards in the free speech area. Under this doctrine, the court strikes down statutes that fail to give "clear standards as to the nature of speech for which [an individual] can be punished." Nowak, Rotunda, Young, CONSTITUTIONAL LAW 726 (1978). *See, e.g.*, Hynes v. Mayor and Council of Oradell, 425 U.S. 610 Central Hudson Gas v. Public Service Com'n of N.Y., 100 S. Ct. 2343 (1980); Linmark Associates, Inc. v. Willinboro, 431 U.S. 85 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 435 U.S. 748 (1976). *But See* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Groucho Marx Productions Inc. v. Playboy Enterprises, Inc. (S.D.N.Y. No. 77 Civ. 1782, Dec. 30, 1977); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973).

to deter all but the most courageous (not necessarily the most rational) from entering the market place of ideas."[65] In addition, this standardless ad hoc process necessarily places much discretion in the judge. Absent a standard, a judge may be too easily swayed by strong popular opinion when balancing the conflicting interests.[66] Finally, the focus in *Marx* on "commercialization" distorts the analysis. By applying "commercial analysis," courts allow more restrictions on speech. Two reasons exist for not doing so here: (1) entertainment is protected speech, and is not commercial in the same sense as advertising[67] and (2) the trend is to give informative commercial speech more protection.[68]

Thus, while the literary works tests fail to adequately protect the celebrity's interest, the ad hoc process fails to adequately protect the first amendment interest. A new test is needed, therefore, to protect both interests.

III. Proposed Test

To avoid the ad hoc analysis and its attendant problems in other areas involving speech, the Supreme Court has frequently used a definitional analysis.[69] Under a definitional analysis, the Court balances the speech and nonspeech interests by defining in advance what is protected first amendment speech.[70] The definition then provides a consistent standard for judging whether the speech in question should receive first amendment protection. Rather than balancing the conflicting interest in each case, the trial court merely decides whether the speech meets the definitional standards. Thus, the balancing is actually done when the court adopts a particular definition. While some may disagree with the definition the court chooses, a writer or performer at least has some notice of what speech the court

65 Nimmer, *supra* note 63, at 939.

66 *Id.* at 940.

67 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

68 Central Hudson Gas v. Public Service Com'n of N.Y., 100 S. Ct. 2343 (1980); Linmark Associates, Inc. v. Willinboro, 431 U.S. 85 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). *cf.* Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Grouch Marx Productions Inc. v. Playboy Enterprises, Inc. (S.D.N.Y No. 77 Civ. 1782, Dec. 30, 1977); Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973).

69 Goetsch, *supra* note 62 at 59. The Supreme Court has developed definitional tests in the obscenity, privacy, and libel areas. Miller v. California, 413 U.S. 15 (1973) (obscenity); Time, Inc. v. Hill, 385 U.S. 374 (1967) (privacy); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel).

70 Goetsch, *supra* note 62, at 59.

will protect. The standard limits the judge's discretion and, therefore, avoids a chilling effect which might otherwise inhibit protected speech.

One commentator proposes a definitional analysis (the Goetsch analysis) for use in copyright infringement cases that seems particularly well suited for theatrical imitation cases.[71] Under the Goetsch analysis, works which the courts determine to be legal parody would receive first amendment protection. This protection would preclude right of publicity actions brought to restrain the work. Legal parody, for our purposes, is defined as a recognizably distinct work developed from a previous, indentifiable work through the use of satiric imitation and invention.[72]

This analysis focuses on whether the disputed work bears the author's creative touch. The amount of material the imitator appropriates from the original work and the imitator's motivation for creating the work are irrelevant.[73] Thus, the Goetsch analysis would protect celebrities from appropriations of their name or likeness in imitations devoid of creative input, while protecting works which use imitations to contribute original thoughts to the "market place of

71 Goetsch, *supra* note 62. Goetsch actually proposes his test for use in copyright infringement cases. He argues that the "fair use" test courts currently use for determining whether a copy violates the original work's copyright is essentially an inadequate ad hoc test. The "fair use" test focuses on the amount of material copied from the original work and the copier's commercial motivation. Hence, a copy which appropriates a substantial amount of original material will likely violate the original's copyright, as will a copy made primarily for commercial purposes. The Goetsch analysis eliminates the "fair use" test and seeks to protect the copyright holder's economic interest vis-a-vis the copier's first amendment interest. It is accomplished through the use of a definitional test that eliminates the need for ad hoc considerations of the amount appropriated and the copier's motivation.

The Goetsch analysis is applicable to right of publicity actions, as well as to copyright actions because the interests are so similar. Copyright laws protect against the unauthorized appropriation of work created by another. This protection encourages creativity by ensuring that others will not profit unjustly from the protected work. Goetsch, *supra* note 62 at. Copyright Act of 1976, 17 USC app. §§ 101-810 (1976 & Supp. I 1977). The right of publicity protects a celebrity's name or likeness from unauthorized use by another. The right thus encourages persons to achieve recognition and fame by protecting their ability to profit from their notoriety. Felcher & Rubin, *supra* note 2, at 1618-19; Felcher & Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death*? 89 YALE L.J. 1125, 1130-31 (1980). The Supreme Court has analogized the right of publicity to copyright law (Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977)), and other courts and commentators have suggested copyright law as a guideline for placing durational limits on the existence of a right of publicity. Estate of Presley v. Russen, 513 F. Supp. 1339, 1355 n. 10 (1981); Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 862, 864, 160 Cal. Rptr. 352, 355, 603 P.2d 454, 457 (1979); Lugosi v. Universal Pictures 25 Cal. 3d 813, 847, 160 Cal. Rptr. 323, 344, 603 P.2d 425, 446 (1979) (Bird C.J. dissenting).

72 Goetsch, *supra* note 62, at 43.

73 *Id.* at 53.

ideas."[74] Application of the Goetsch analysis to *Presley* and *Marx* illustrates its use in, and impact upon, theatrical imitation cases.[75]

In *Presley*, the objectional activity was a theatrical presentation entitled the "Big El Show." The show essentially recreated an Elvis Presley concert and featured a mimic who looked, dressed, and sang like Elvis. The show opened with a band playing the theme from the movie "2001 - A Space Odyssey" (the song Elvis had used to open his concerts) and continued as the mimic sang popular Presley songs.[76]

The Goetsch analysis requires some showing of creativity or satiric invention for a disputed work to receive protected legal parody status. In *Presley*, no such showing was made. As the court aptly stated, the "[Big El] [s]how serves primarily to commercially exploit the likeness of Elvis Presley without contributing anything of substantial value to society."[77] The court compared the Big El Show to the wholesale appropriation of an "entire act" found objectionable in *Zacchini*.[78] The court saw little difference in showing an unauthorized film of an Elvis Presley concert and presenting a live recreation starring an Elvis imitator.[79]

More importantly, the court noted that the Big El Show was not part of a new and different work.[80] Rather, the show was mere imitation, lacking the creative invention inherent in legal parody. Indeed, the court invited the defendant to supplement the trial record and establish that the Big El Show added creative elements so that it could be considered a distinct work.[81] Since no showing was made, no legal parody existed, and the performance would not warrant first amendment protection under a Goetsch analysis.

Marx, on the other hand, provides an example of a work that would be protected under the legal parody standard. *Marx* involved *A Day in Hollywood/A Night in the Ukraine*, a two-act musical comedy written by Frank Vosburgh, a film critic and historian. Vosburgh

74 Netterville, *supra* note 52 at 254.

75 Although the courts have not yet adopted the Goetsch analysis, the protection afforded parody has recently been expanded. *In Elsmere Musci, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (1980), the court held that "[t]he issue to be resolved [in copyright infringement cases] by a court is whether the use in question is a valid satire or parody and not whether it is a parody of the copied . . . [work] itself. *Id.* at 746. Hence, the parodist needn't parody the copied work itself, so long as the use is part of a volid satire or parody.

76 *Presley*, 513 F. Supp. at 1348.

77 *Id.* at 1359.

78 *Id.* at 1361.

79 *Id.*

80 *Id.* at 1359 n. 21.

81 *Id.* at 1359 n. 22.

presented the play in the form of a 1930's movie double feature. The first act presented musical skits spoofing 1930's musicals and included comic imitations of Judy Garland, Jeanette McDonald, Fred Astaire and others. In the second act, he adapted Chekov's *The Bear* into the style of a Marx Brother's movie, complete with imitations of Chico, Groucho, and Harpo.[82]

Although *Day/Night* resembles the *Big El Show* in that both rely on imitations as a form of entertainment, *Day/Night* is distinguishable in several important aspects. Initially, the Marx Brothers imitations in *Day/Night* must be viewed as a segment of a distinct work that parodies and comments on a specific entertainment genre — 1930's Hollywood movies.[83] In addition, the Marx Brothers segment does not merely recreate an old Marx Brothers film. Rather, the playwright expended substantial creative energy to adapt a serious dramatic work - Chekov's *The Bear* - into a Marx Brothers style comedy. In short, "[t]he original work, [the original Marx Brothers characterizations,] became part of a new and different work which derives its popularity from the added creative elements."[84] It is thus legal parody under the Goetsch analysis and would receive first amendment protection in any right of publicity action.

In *Day/Night*, the court actually focused on two analytical strains which the Goetsch analysis avoids. The court first noted that "[w]here the use [of the Marx Brothers' characterizations] is largely for commercial purposes, the right of publicity prevails."[85] Under the Goetsch analysis, however, once a court classifies a work as legal parody, the commercial motivation for producing the work is irrelevant.[86] In addition, the court focused on the play's "wholesale appropriation of the Marx Brothers characters."[87] Again, under the Goetsch analysis, the work receives first amendment protection regardless of the amount of material appropriated from the original work, once the court classifies its as a legal parody.[88]

Presley and *Marx* represent extremes under the Goetsch analysis. The gray area between those works devoid of, and those works filled with creativity may present problems when courts try to decide

82 TIME, May 12, 1980, at 83.

83 "Parodies which satirize entire genres . . . rather than a specific previously published work, also qualify as legal parodies." Goetsch, *supra* note 62, at 43-44.

84 *Presley*, 513 F. Supp. at 1359 n. 21.

85 *Marx*, 50 U.S.L.W. at 2230.

86 *See* note 71 *supra* and accompanying text.

87 *Marx*, 50 U.S.L.W. at 2230.

88 *See* note 71 *supra* and accompanying text.

whether a work is legal parody. Three factors the courts should consider are: (1) in what context does the imitator appear?[89] (2) does the author or performer contribute something other than the imitation and?[90] (3) does the copy deviate substantially from the original work?[91]

These factors would focus a court's examination on those aspects of creativity and comment central to a legal parody determination. Essentially, the question is whether the imitation is sufficiently altered such that it is no longer *just* an imitation. Although some balancing results, it is factual and not abstract, unlike the first amendment - right of publicity balancing.

Application of the Goetsch analysis would change the result in *Marx*. On the other hand, this analysis would uphold right of publicity actions against imitations that add little or no creative thought. The Goetsch analysis would also provide a standard that gives notice to imitators and controls judicial discretion, thus eliminating the present uncertainty in theatrical imitation-right of publicity actions. The balancing inherent in this analysis, with its shift from the abstract to the factual, adequately protects celebrities' right of publicity and artists' first amendment interests. Further, under the Goetsch analysis, the courts would continue to protect celebrities from imitations involving deception, misrepresentation[92] and advertisements.[93]

Conclusion

Right of publicity actions often conflict with the first amendment guarantee of free expression.[94] Courts have attempted to resolve this conflict by applying a variety of standards.[95] In theatrical imitation cases, the courts should adopt the Goetsch analysis. This analysis would preclude right of publicity actions against works that

89 For example, does the imitation comprise the entire performance, as in *Presley*, or is the imitation part of a more extensive production, as in *Marx*?

90 In the *Big El Show*, the only talent showcased was the imitator's ability to mimic Elvis Presley, while *Day/Night* showcased Frank Vosburgh's writing skill as much as it did the mimics' talent.

91 The *Big El Show* was virtually a replica of an Elvis Presley concert. *Day/Night*, on the other hand, featured impersonators of well known comics, the Marx Brothers, in an adaptation of a serious dramatic work by Anton Chekov.

92 *See* notes 23-30 *supra*. The Goetsch analysis would not affect application of the *Spahn/Hicks* standard.

93 *See* notes 32-34 *supra*. The Geotsch analysis would also not affect the *Frosch* standard in cases of disguised commercial advertisements.

94 *See* notes 5-7 *supra* and accompanying text.

95 *See* notes 8-43 *supra* and accompanying text.

are distinct, creative parodies of the original works. Adoption of the Goetsch analysis would provide more certainty in theatrical imitation cases, giving more notice to third parties as to what are protected first amendment works. In addition, while expanding the first amendment protection currently provided under the ad hoc analysis, the Goetsch standard would protect a celebrity's right of publicity interest where the standard for protection of literary works would not.[96] The important interests on both sides of the theatrical imitation question demand adoption of a clear, ascertainable standard, which Goetsch provides.

John C. Greiner

96 *But see Marx*, 50 U.S.L.W. at 2230, where the Goetsch analysis would not protect the celebrity's right of publicity interest.